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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

INTERSTATE INCOME PROPERTIES, INC., a Utah corporation, and BRB-5 A, LLC, a Utah Limited Liability Company,

Plaintiffs and Appellees,

vs. District Court No. 090907394

D. GREGORY HALES aka DON GREGORY HALES aka D. ROBERT HALES; et al., Appellate No. 20100025

Defendants and Appellants.

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE DECEMBER 9, 2009 JUDGMENT ENTERED BY THE UTAH THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, THE HONORABLE KATE TOOMEY PRESIDING

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Defendants and Appellants.

REPLY BRIEF OF APPELLANTS

Defendants/Appellants La Jolla Loans, Inc. and its assignees (collectively "La Jolla"), respectfully submit this Reply Brief. In the Brief of Appellees, Interstate Income Properties, Inc. ("Interstate"), and BRB-5 A, LLC, a/k/a BRB-5 (hereinafter "BRB-5"), attempt to recharacterize the issues on appeal as: (i) whether La Jolla sufficiently marshaled the evidence; and (ii) whether the trial court's findings of fact are supported by the record. By trying to re-frame the issues, Plaintiffs miss the points raised in La Jolla's appeal and, in so doing, Plaintiffs ignore the actual legal issues before this Court. La Jolla is not challenging

the basic underlying factual findings. Instead, La Jolla is challenging certain legal decisions made by the trial court along the path it took in ultimately determining that La Jolla's deed of trust was a wrongful lien and void ab initio. In other words, in reaching its decision, the trial court made various legal conclusions and determinations that were not correct. It is these decisions that La Jolla challenges on appeal.

REPLY TO STATEMENT OF FACTS

Plaintiffs made several factual statements that are deserving of note.

1. There is no dispute that Interstate attempted to transfer Pad A to BRB-5 on October 22, 1997. *See* Br. of Appellees at 4.

2. There is no dispute that BRB-5's articles of organization were filed on October 24, 1997. *Id.*

3. There is no dispute that Barbara Busch signed the quit claim deed without any indication of her corporate capacity or authority. *Id.* at 4-5.

4. There is no dispute that the trial court specifically determined that: (1) on October 22, 1997, Interstate conveyed Pad A to BRB 5; (2) that the quit claim deed transferred all of Interstate's interest in Pad A to BRB 5; (3) that the quit claim deed was recorded on October 24, 1997; (4) that D. Gregory Hales ("Hales"), as a putative officer of Interstate, executed a quit claim deed conveying Pad A to Carlsbad Development, LLC ("Carlsbad"); and (5) Carlsbad executed a deed of trust in favor of La Jolla, which was recorded on June 8, 2007. *See* R. at 886-87.

5. The trial court granted Plaintiffs' petition to nullify La Jolla's deed of trust, declaring it to be null and void. R. at 888 & 901.

6. Lastly, there is no dispute that the trial court did not make any findings or determinations about winding up, the intended delivery date for the October 22, 1997 quit claim deed, or Hales' actual or apparent authority to execute a quit claim deed conveying Pad A from Interstate to Carlsbad.

ARGUMENT

POINT I

LA JOLLA IS NOT CHALLENGING THE TRIAL COURT'S FINDINGS OF FACT; HENCE, IT IS NOT REQUIRED TO MARSHAL THE EVIDENCE.

After correctly setting forth the standard and various policy pronouncements applicable to marshaling evidence, Appellees argue that a trial court's determination that a document filed against an owner's property is a wrongful lien is a highly fact-dependent question. Br. of Appellees at 11. Appellees then endeavor to recharacterize the issues on appeal, arguing that "La Jolla challenges the trial court's determination that, based upon the facts presented at the wrongful lien hearing, the La Jolla Deeds of Trust were wrongful liens." *Id.* at 12. Appellees assert that "[t]his is a quintessential fact question." *Id.* In setting up the issue as they did, Appellees have misread La Jolla's brief and they miss the point.

Appellees' argument conflates the factual determinations to be made in a wrongful lien hearing and the legal conclusions to be determined by the court based on the facts found by the court into one giant question of fact. This approach is wrong. There are questions of

fact that need to be determined. But this appeal deals with the conclusions of law based on those facts. The cases cited by Appellees actually show, by way of contrast, that the issues presented in this appeal are not challenges to findings of fact made by the trial court; instead, La Jolla is appealing the legal questions determined by the trial court.

For example, in *Chen v. Stewart*, 2004 UT 82, the defendants argued that there was "no evidence" supporting the trial court's findings relied on to justify a preliminary injunction. *Id.* at ¶ 82. The Court rejected the argument noting that the record contained findings of fact and the defendants' attempt to point to facts that would support findings contrary to the trial court was not sufficient to convince the Court that the trial court's findings were erroneous. *Id.* at 82-83. Notably, the defendants were not arguing that the trial court adopted the wrong standard when issuing the preliminary injunction–that would have been a legal issue.

In this case, La Jolla is not challenging, for example, the finding that Appellees incorporated BRB-5 on October 24, 1997 or that the quit claim deed to Pad A was executed on October 22, 1997. If that was La Jolla's argument (e.g., that the trial court should have found that La Jolla incorporated on October 26, 1997 or that the transfer of Pad A occurred on some different date), then La Jolla agrees that it would have been required to marshal the evidence. On the other hand, La Jolla is challenging the legal determination that BRB-5 existed on October 22, 1997, when the quit claim deed was executed and delivered. Whether or not a corporate entity actually existed on the delivery date is a question of law. The underlying findings on this issue are not disputed, i.e., that the quit claim deed was signed

on October 22, 1997 and the articles of organization were filed on October 24, 1997. The dispute on appeal is the legal question involving the efficacy of the purported conveyance on October 22, 1997.

Similarly, in *Steenblik v. Lichfield*, 906 P.2d 872 (Utah 1995), a jury found Lichfield liable for securities violations, fraud, and negligence. On appeal, Lichfield argued that the verdict was against the clear weight of the evidence. *Id.* at 875. For instance, Lichfield argued that his relationship with an investment firm had been previously severed; thus, he could not be liable under the securities act. *Id.* Reviewing the evidence, the court found ample support for the jury's finding that Lichfield and the investment firm had an on-going relationship. *Id.* at 876. Again, however, La Jolla is not suggesting that a finding of fact made by the trial court is against the clear weight of the evidence. The parties generally agree on the facts. The findings are not the issue in this appeal.

Likewise, in the case styled as *In the Matter of E.H. v. R.C. and S.C.*, 2006 UT 36, a mother argued a trial court's determination that she relinquished her parental rights was clearly erroneous. *Id.* at ¶ 3. The mother, however, failed to marshal any evidence regarding the facts of her alleged relinquishment. *Id.* at ¶ 65. The Court refused to consider her arguments. *Id.*

The issues before the Court in that case versus the one *sub judice* are not even remotely similar. La Jolla is not challenging factual findings since the dispositive facts are relatively undisputed; rather, La Jolla is challenging certain legal conclusions made by the

trial court based on those findings. And, this is precisely the point that is missed by Appellees.

Lastly, Black's Law Dictionary defines "findings of fact" as a "decision upon a question of fact," "a recital of the facts as found," "a conclusion drawn by trial court from facts without the exercise of legal judgment." Black's Law Dictionary (6th ed. 1990) at 632. "Conclusions of law" are defined as "[p]ropositions of law which judge arrives at after, and as a result of, finding certain facts in case." *Id.* at 290. There is a distinct difference between findings of fact and conclusions of law. Appellees, however, combine the two legal principles into one and contend that La Jolla is appealing the trial court's findings of fact. This is incorrect. The Court should not be induced to follow Appellees' invitation to view the issues on appeal as challenges to the trial court's findings of fact. Marshaling is not required in this appeal.

POINT II

INTERSTATE'S ATTEMPT TO CONVEY PAD A TO BRB- 5, A NON-EXISTING ENTITY, THROUGH THE OCTOBER 22, 1997 QUIT CLAIM DEED WAS INEFFECTIVE.

Plaintiffs contend that this Court should affirm the trial court's determination that the October 22, 1997 quit claim deed was effective to transfer Pad A to BRB-5, which was not organized on the presumed date of delivery. In support of this contention, Plaintiffs argue that the quit claim deed "substantially" complied with Utah Code Ann. § 57-1-13.

Plaintiffs' argument about substantial compliance presupposes the very legal issue on appeal. Can a party, who substantially complies with Utah Code Ann. § 57-1-13, convey title

to a non-existing entity? La Jolla directed this Court to scores of cases and secondary authorities recognizing that a conveyance to an entity that has not been organized is a legal nullity.

Plaintiffs argue that whether one can convey title to a non-existing entity is completely irrelevant. Plaintiffs then baldly contend that the trial court "clearly considered whether or not the 1997 Quit Claim Deed was delivered to BRB-5 through a transaction of business that was incidental to BRB-5's organization." Br. of Appellees at 19.

First, there are no findings of fact made by the trial court about BRB-5's pre-filing activities. More importantly, however, is the fact that the interpretation of Utah Code Ann. § 48-2c-404 is a question of law, not a determination of fact. What are permissible "incidental" activities is a matter of statutory interpretation. As La Jolla pointed out in its Brief, Plaintiffs were unable to offer any authorities at the wrongful lien hearing to support the sweeping notion that conveyances of land are mere incidental pre-filing transactions. In their response brief, Plaintiffs again failed to offer any legal support for their argument that deeding title to property to a non-existing entity is an incidental transaction.

This Court should interpret Utah Code Ann. § 48-2c-404 in light of the many cases dealing with pre-filing activities. The cases clearly hold that one cannot convey title to a non-existing entity. In this case, the October 22, 1997 quit claim deed was delivered before the October 24, 1997 filing of BRB-5's articles. Whatever "incidental" means under the statute, it must be something less than conveying property; otherwise, the interpretation

would effectively overrule the cases which hold property cannot be conveyed to a non-existing entity.

Plaintiffs argue that the trial court's determinations that the 1997 Quit Claim Deed "satisfied the statutory requirements of U.C.A. § 57-1-13" and "transferred all of Interstate's interest in Pad A to BRB-5" (R. at 886), disposes of La Jolla's argument. Utah Code Ann. § 57-1-13 deals with form and effect of a quit claim deed. The statute sets out the required language for quit claim deeds and states that when the quit claim deed is thus executed as required by law, it conveys the interest of the grantor.[1] Accordingly, this statute provides what a legally sufficient quit claim deed should say at a minimum. It does not validate a conveyance otherwise unacceptable under the law.

Under Plaintiffs' reading of the statute, a minor child, under duress, could execute a quit claim deed to a non-existing trust, and if the trial court determined that the quit claim deed satisfied the requirements of § 57-1-13 (said the right words, identified the grantor and grantee and the property, and was signed and dated); then the conveyance can be affirmed by an appellate court. The problem with this approach is obvious. Other legal infirmities torpedoed that hypothetical transaction.

In this case, the blow that sunk Plaintiffs' ship was the fact that BRB-5 did not exist on the presumed date of delivery. That fact is undisputed. Thus, even if the quit claim deed

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[1]It is interesting to note that Utah Code Ann. §§ 57-1-12 & -12.5 refer to a conveyance to a "grantee." These related statutes show that there must be a valid grantee for the conveyance to take effect. Thus, even if the deed in question substantially followed the statutory form, if there is not a valid and proper grantee, there can be no conveyance.

contained all of the required statutory language (in other words, it satisfied the requirements of § 57-1-13), it cannot operate to convey an interest in land to an entity that does not exist. When the trial court determined that the quit claim deed effectively transferred Pad A from Interstate to BRB-5, it committed a legal error.

Plaintiffs would bootstrap § 48-2c-404 to § 57-1-13, arguing if you comply with the latter, then the conveyance must be an acceptable "incidental" business transaction. This example of circular reasoning is a non-starter. Section § 48-2c-404 does not allow a company to transact business, except for certain, limited incidental pre-filing transactions. One cannot create a backdoor to the express prohibition against conducting business by relying on another statute that simply recognizes the minimum requirements to effectively convey property by means of a quit claim deed. The issue boils down to this: Was the October 22, 1997 quit claim deed a mere "incidental" pre-filing transaction that effectively transferred Pad A to BRB-5, which was at the time a non-existing entity?

La Jolla submits that the cases and great weight of authority hold that the October 22, 1997 quit claim deed was a legal nullity. If BRB-5 did not exist on October 22, 1997, to whom was the property conveyed? Furthermore, if BRB-5 did not exist on October 22, 1997, was the so-called "incidental" transaction supposed to be consummated whenever the parties got around to actually organizing BRB-5, be that two days, two months, or two years

after the deed was signed? The obvious answer to these questions illustrates perfectly the legal fallacy of Plaintiffs' arguments.[2]

Plaintiffs' discussion of the de facto corporation doctrine also confuses the argument. The line of cases cited by La Jolla simply recognizes the abolishment of the de facto corporation doctrine. La Jolla agrees with Plaintiffs that the cases do not interpret "incidental" transactions within the meaning of § 48-2c-404. The legal standard to be taken from these cases is that under Utah law a corporation or LLC does not exist until its articles are filed. It is that simple. There is no corporate entity until the organizing documents are filed.

Plaintiffs admit that BRB-5 was not organized when the October 22, 1997 quit claim deed was executed and delivered. Plaintiffs' repeated efforts to characterize the transactions as a mere "incidental" pre-filing transaction evidence as much. Accordingly, Plaintiffs argue that they can legally effectuate an "incidental" transaction even though the established law of the State dictates that a conveyance to a non-existing entity is a legal nullity. When the trial court agreed with Plaintiffs, it erred.

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[2]If pre-filing conveyances are permitted as so-called "incidental" transactions, there is no principled way to determine how long of a delay is acceptable between conveying to a non-existing entity and the actual organization of that entity. If two days is acceptable, why not two months? Why not two years? According to Plaintiffs, it only matters that a party intended the pre-filing transaction to be "incidental"; in other words, timing does not matter. The only definite and clear line to draw, however, is the one that is based on the actual organization of the entity. The law should not be required to suspend the effectiveness of a transaction until parties decide to file organizing articles. Hence, if the company did not exist on the purported transfer date, the transaction was a nullity. This is the clear pronouncement of law the Court should make.

POINT III

BARBARA BUSCH'S PERSONAL SIGNATURE ON THE QUIT CLAIM DEED WAS A FATAL DEFECT.

It is not disputed that Barbara Busch personally signed the quit claim deed, without any indication whatsoever as to her status or title as the signatory. Plaintiffs claim that Utah Code Ann. § 57-1-13 does not require a corporate entity conveying land to have the signatory designate his or her title/authority on the signature line. While it is true that § 57-1-13 and §§ 57-1-12 & -12.5, for that matter, do not contain an express requirement regarding signatures, that does not mean that there are no requirements regarding signatures on deeds. As explained in La Jolla's brief, Utah Code Ann. § 57-2a-2 sets forth the law regarding acknowledged signatures; namely, that the person executed the document for the purposes stated therein. In other words, that Barbara Busch executed the deed individually and not on behalf of Interstate.

Plaintiffs belabor the point that Barbara apparently executed the deed with actual authority from Interstate. The issue is not whether Barbara Busch was authorized by Interstate to execute the deed. The issue is whether her execution of the deed, without an indication of her corporate capacity, was legally sufficient.

Plaintiffs argue that an "objective review of the 1997 Quit Claim Deed reveals that Barbara Busch signed in her capacity as director of IIP." Br. of Appellees at 16. The only thing an objective review of the deed shows is that Barbara signed it without denoting her corporate capacity–hence, she signed it individually. Nothing in the deed evidences her

authority to sign for Interstate. Under Plaintiffs' theory, anyone could have validly signed the deed so long as they had actual authority from the corporation (for that is all there is in this case). To remove the uncertainty that would result from Plaintiffs' proposed approach, Utah Code Ann. § 57-2a-2 requires the agent to acknowledge the position held in the corporation.

Paradoxically, Plaintiffs contend that nowhere in the deed is there a reference to Barbara acting individually; thus, she must have been acting in a corporate capacity. This argument turns the standard upside down. One does not need to list his or her status when signing an instrument as an individual; rather, a signatory acting for a company is required to list his or her status. It makes no sense to argue that the deed is devoid of any reference to her individual capacity, when that is the default position absent some indication to the contrary.

Plaintiffs' reliance on the word "substantially" in Utah Code Ann. § 57-1-13 is also unavailing. Plaintiffs attempt to validate the conveyance so long as the deed "substantially" complied with the Act. As noted above, Plaintiffs are misconstruing the intent and effect of § 57-1-13. This code section sets forth the minimum requirements of the language and form needed to convey property by quit claim deed. The actual language from the statute is "substantially *in the following form*" (emphasis added). *See also* Utah Code Ann. §§ 57-1-12 & -12.5. The language refers to the form of the deed. That is all.

This section cannot be used to revive an otherwise defective deed or conveyance. To the extent that Barbara's signature failed to comply with the statutory requirements, no

amount of reliance of the form of language used in the deed can remedy that deficiency. The interpretation of these statutes (i.e., "acknowledged by" requirements of § 57-2a-2 and "substantially in the following form" of § 57-1-13), moreover, is a legal question to be decided by this Court without deference to the trial court's decisions. The trial court erred when it determined that Barbara Busch's individual signature was effective on the quit claim deed.

Plaintiffs' arguments relating to Utah Code Ann. § 57-4a-4(g) are wrong. The presumption is that the person executing the document holds the position so stated and has the authority to sign the document. Where no position is stated as in this deed, the presumption cannot apply. Under Plaintiffs' theory of the case, a presumption arises that the signatory holds the unstated position and has the unstated authority to so act. This approach does not make sense. The statute does not apply so broadly. Barbara may have had actual authority based on some alleged meeting, but nothing from the deed would indicate that was the case.

POINT IV

BECAUSE THE DISTRICT COURT FAILED TO MAKE SUFFICIENT FINDINGS, THIS COURT CANNOT UPHOLD ITS DECISION TO VOID THE LA JOLLA DEED OF TRUST

La Jolla pointed out that the trial court simply announced its ruling at the close of the wrongful lien hearing. (Tr. at 120:20-22.) It did not make any specific findings about winding up,[3] the authority of Hales, or the intended delivery date. In their Response Brief, Plaintiffs acknowledge as much.

Plaintiffs did not even attempt to point to any findings of the district court on these issues, because there are no such findings. Instead, Plaintiffs argue that the trial court ruled that the October 22, 1997 quit claim deed was effective; hence, no further inquiry on these other issues was required. Plaintiffs' case stands–and falls– entirely on the effectiveness of the October 22, 1997 quit claim deed that was executed and presumably delivered when BRB-5 indisputedly did not exist. As La Jolla argued in its brief, if the October 22, 1997 quit claim deed is not effective, which it is not, then there are absolutely no other findings or legal determinations by the district court to otherwise support nullification of La Jolla's deed of trust.

[3]The issue with respect to winding up is not whether Plaintiffs brought their claim in a timely manner. On the contrary, in its brief La Jolla simply pointed out that the district court failed to make any findings or legal determinations that BRB-5's claims were statutorily authorized as "winding up" activities.

CONCLUSION

For the reasons set forth above, the Court should reverse the trial court and, if necessary, remand for further proceedings.

DATED this 4th day of June, 2010.

BLACKBURN & STOLL, LC

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CERTIFICATE OF MAILING

Monica J. Spehler says that she is employed by the law offices of Blackburn & Stoll, LC, attorneys for certain defendants, and that on the 4th day of June, 2010, she served two copies each of the **REPLY BRIEF OF APPELLANTS** (Utah Ct. App., Case No. 20100025), along with a courtesy CD, upon the following counsel of record by first-class mail, postage prepaid:

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